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No. 92-2029

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

MARIANO ALVARADO,

Petitioner,

v.

COUNTY OF STANISLAUS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Petitioner Mariano Alvarado respectfully submits this reply to respondents' brief in opposition to petitioner's request that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Fifth Appellate District, which became final in the above-entitled proceeding on March 22, 1993.

REPLY TO BRIEF IN OPPOSITION

In their opposition brief, respondents raise for the first time the argument that petitioner lacked diligence in prosecuting his action under 42 U.S.C. section 1983. Respondents' Brief In Opposition, at pp. 13-14. Respondents contend that petitioner is using the tolling provision of California Government Code section 945.3 as a shield from compliance with the one-year statute of limitations of California Code of Civil Procedure section 340(3).

What respondents do not note when they argue petitioner's lack of diligence is that the Court of Appeal's interpretation of California Government Code section 945.3[1] transforms the tolling provision of that section into an *election* provision. Furthermore,

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[1] California Government Code provides in pertinent part:

> No person charged by complaint, or other accusatory pleading charging a criminal offense may bring a civil action for money or damages against a peace officer or the public entity employing a peace officer based upon conduct of the peace officer relating to the offense for which the accused is charged, including an act or omission in investigating or reporting the offense or arresting or detaining the accused, while the charges against the accused are pending before a justice, municipal, or superior court.
>
> Any applicable statute of limitations for filing and prosecuting these actions shall be tolled during the period that the charges are pending before a justice, municipal or superior court.

according to the Court of Appeals, such an election need be made only by criminally-accused plaintiffs such as petitioner: that is, plaintiffs who seek to pursue a federal civil rights action, against law enforcement officials, in state court, without joining state tort claims.

Not only is forcing such an election inappropriate for the reasons argued in petitioner's Petition for Writ of Certiorari, it is also an astounding leap in logic that no amount of diligence could have foreseen. This is particularly true given that the basic definition of "tolling" means "to *suspend* or stop temporarily, as the statute of limitations is tolled during the defendant's absence from the jurisdiction and during the plaintiff's minority." *Black's Law Dictionary* (5th ed., 1979) (emphasis added).

Venerable case law long ago defined the term "to suspend," or toll, a statute of limitations. For example, in *United States v. Markowitz* the district court stated:

> When the running of the statutory period of limitations is suspended, the limitation period is *arrested*; it is prevented from running any further during the time of suspension, and when the time of suspension is over, the statutory period of limitations commences to run again.

United States v. Markowitz, 34 F.Supp. 827, 830 (N.D. Cal. 1940) (emphasis added). *See also United States v. Showalter*, 103 F.Supp. 806, 809 (N.D. Cal. 1952) (noting that the unambiguous meaning of suspension of a statute of limitations is to hold the statute in abeyance, make it

temporarily inoperative, or to arrest, interrupt or stop the statute for a time).

In this case, under the controlling precedent of *Harding v. Galceran*, 889 F.2d 906 (9th Cir. 1989), *cert. denied sub nom, Galceran v. Harding,* 111 S.Ct. 951 (1991), petitioner rightfully relied on the explicit language of California Government Code section 945.3; to wit, that "[a]ny applicable statute of limitations for filing and prosecuting [a civil action] *shall be tolled* during the period that the charges [against the civil plaintiff] are pending before a justice, municipal, or superior court." (Emphasis added.) *See* Petition for Writ of Certiorari, pp. 10-18 (discussing in detail the *Harding* opinion, which held that while section 945.3 could not prohibit a plaintiff from bringing a section 1983 claim against law enforcement officials while a criminal action was pending against that plaintiff, section 945.3's tolling provision still applied to toll the limitations period until the criminal action was terminated).

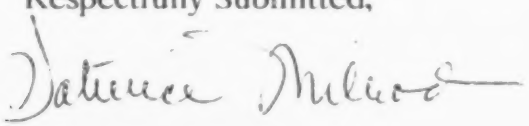
During the time the Stanislaus County District Attorney's office prosecuted petitioner--in the hope no doubt that a conservative Stanislaus County jury would convict him and thereby head off a civil action against the officers who injured him--section 945.3 says the statute of limitations was "tolled." Petitioner was entitled to understand by that language that the applicable statute of limitations was *suspended* or stopped during the pendency of his criminal prosecution. Neither section 945.3, nor pertinent case law, suggested the interpretation adopted by the Court of Appeal: that in fact petitioner faced an election between two

mutually-exclusive time periods for filing his section 1983 action: 1) during the pendency of the criminal proceeding but within one year of the event; or 2) after the termination of the criminal prosecution (which ended for Mr. Alvarado in acquittal on all counts). Such an interpretation does violence both to the tolling provision of section 945.3, and to the policies Congress sought to create and protect in enacting 42 U.S.C. section 1983.

CONCLUSION

Like many other potential civil rights plaintiffs, petitioner herein has been shut out of court because he has relied on a federal remedy for his injuries. In fact, petitioner has fallen victim to a California Court of Appeal decision founded neither in law nor policy, and violative of both. Petitioner therefore respectfully requests that this Court grant certiorari herein.

Respectfully Submitted,



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